Filed 9/9/09 P. v. Bealer CA5
Received for posting 9/14/09

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTWOINE BEALER, Defendant and Appellant.	F056778 (Super. Ct. No. 08CM7306) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, James T. LaPorte, and Thomas DeSantos, Judges.

Charles Francis Carbone for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Dawson, J., and Hill, J.

A jury convicted appellant Antwoine Bealer of battery by a prisoner on a non-confined person (Pen. Code, § 4501.5), and found true allegations that appellant had suffered three "strikes."[1] The court imposed a prison term of 25 years to life, and ordered that term to run consecutively to the term appellant was serving at the time of the instant offense.

On appeal, appellant contends he was denied a meaningful opportunity to prepare his defense, in violation of his right to self-representation under the Sixth Amendment to the United States Constitution. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

On April 2, 2008,[2] appellant was an inmate at Corcoran State Prison. Correctional Officer Adam Healy testified to the following. On that date, he entered, and began conducting a search of, appellant's cell. Officer J. Vasquez was standing right outside the cell, and appellant was standing approximately 50 to 75 feet away. Approximately 30 seconds after he entered the cell, Officer Healy heard Officer Vasquez yelling, ordering appellant to move away from the cell. Officer Healy came out of the cell, and saw appellant, who was yelling and swearing, standing approximately an arm's length away from Officer Vasquez.

Officer Healy further testified to the following. He ordered appellant several times to move back, but appellant failed to comply. Rather, appellant took a step toward

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[1] We use the term "strike" as a synonym for "prior felony conviction" within the meaning of the "three strikes" law (Pen. Code, §§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

[2] Further references to dates of events are to dates in 2008.

Officer Vasquez. Officer Healy then grabbed appellant's left wrist, in an attempt to handcuff the inmate, at which point appellant "flung himself to his right" and struck Officer Healy in the face with a clenched fist, near the officer's left eye. Shortly thereafter, the two officers took appellant to the ground, and Officer Healy was able to handcuff appellant.

Officer Vasquez testified to the following. As Officer Healy was attempting to handcuff appellant, appellant "spun around and faced Healy" and "hit Officer Healy in the eye with his clinched fist." Appellant used his right hand and struck Officer Healy in the area of the left eye.

Correctional Officer Christopher Morrow testified he was in the "control booth," approximately 50 feet away from appellant's cell when he saw the following. Appellant approached his cell "from the opposite side of the housing unit and then [came] around and toward the cell." Officer Healy had just entered the cell to conduct a search and Officer Vasquez was standing "just outside" the cell. As appellant approached, Officer Vasquez "put up his hand," at which point Officer Healy came out of the cell. Officer Healy "appeared to be talking to [appellant]." Then, Officer Healy "went around and grabbed [appellant's] left hand," at which point appellant "spun and struck Officer Healy on the left side of [the officer's] face." Appellant struck Officer Healy with "[h]is right hand, with a closed fist."

Appellant testified to the following. He was in the day room when he saw Officer Healy "going toward [appellant's] cell." Shortly thereafter, appellant "looked down where [he] could see [Officer Healy]" in the cell, and appellant saw the officer "throwing some things in the trash can." Appellant became concerned that the officer was improperly throwing away appellant's belongings so he walked toward the cell.

As appellant approached, Officer Vasquez told him to stop. Shortly thereafter, Officer Healy came out of the cell. Appellant and Officer Healy "had a conversation,"

and then the officer "reached out ... and tried to grab [appellant] around the neck." Appellant ducked, and the officer "grabbed [him] by … [the] arm." "[A]t that time, it was kind -- well, there really wasn't a struggle. [Appellant] was tense because [Officer Healy] had [appellant's] arm. And then Officer Vasquez came from behind and hit [appellant]," but appellant "didn't go down." Officer Vasquez "had [appellant] from the back and Officer Healy had [appellant's] arm," and "at that time, ... [appellant's] mind went blank ...."

Subsequently, "after [his] mind had started coming back," appellant "went down" to the ground. At first, "it seemed like" Officer Healy was "trying to break [appellant's arm]," but at some point, appellant put his arms behind his back, the officer "stopped trying to break it or whatever," and "that's when the officers escorted [appellant] ...."

Appellant testified further: "Officer Healy had me by the arm and it was a, you know, little struggle .... I did not hit Officer Healy, though.... [¶] ... I do not do things that does not make sense.... I don't care how much the officer disrespects me, I'm not going to try to hit him because I know it's going to be a losing battle for me.... [¶] ... [¶] But the honest truth is I did not hit Officer Healy, at all. I didn't. There was a minor struggle when he grabbed my arm and ... Officer Vasquez ... hit me from behind, there was a struggle. I'm going to be honest I did because my body went into defense mode. I was being attacked. So there was a slight struggle, but I did not hit Officer Healy, at all. That is totally untrue."

Procedural Background

Appellant chose to represent himself.

On July 28, the court set a trial readiness conference for August 26, trial confirmation for September 16 and commencement of trial for September 17.

At the outset of the trial readiness conference on August 26, appellant stated he was not ready for trial. He confirmed that he was confined in state prison, and stated, "I

haven't been able to get into the law library. I don't have any case laws yet. Anything." Appellant claimed he was entitled to "priority access" to the law library, under "CCR, Title 15."

Appellant further told the court the following: he had "ask[ed] the [prison] law clerk every day" for permission to use the law library, but since June 26, appellant had "only been able to use the computer two times"; he had requested copies of "some case laws" but he had not received them; and he had "no materials at all, Penal Code or the Evidence Code, anything." He repeated several times that he was not being allowed access to the prison law library.

Appellant asked the court to appoint "co-counsel." The court denied the request.

Appellant asked the court to make an order that the prison provide appellant with "access to the law library." The court responded it could not make such an order because the Department of Corrections and Rehabilitation (DCR) was not "before the Court," and that in order for the court to do so, appellant, would "have to file appropriate writs." Appellant countered that in order to proceed as the court suggested, he needed access to the law library so that he could research the law and prepare the necessary documents. The court responded, "that's part of the problem of being a pro per," and offered to appoint counsel to represent appellant. Appellant declined the offer, and reiterated he wanted "priority law library access." The court responded, "Again, that's something you have to take ... up with the prison."

On September 3, the court issued a written order in which it stated the following: Appellant had sent a letter to the court "charging Corcoran State Prison personnel with interfering with his right to access prison legal facilities and/or reference materials ...." The court set a hearing for September 16, prior to the pre-trial conference, to "consider [appellant's] claims of inadequate legal access and determine whether a continuance of the trial date and/or an order directing [DCR] to provide [appellant] with additional

access to the library, is appropriate." The court "requested" the People and the DCR "to provide the Court on or before the date of the hearing, any and all evidence and/or other documents in their possession which may clarify for the Court the frequency with which [appellant] is receiving access to the law library and/or the basis for any denial of access consistent with California Code of Regulations, title 15, [s]ection 3122, subdivision (a)."

On September 16, at the outset of the proceeding, appellant indicated the he was "asking for a continuance on the trial so that he [could] have further access to the law library ...."[3] The prosecutor objected on the grounds that appellant had been previously "advised he needed to file a motion to continue" but appellant had not done so. The prosecutor further stated he had received the court's September 3 order on the morning of September 16, and that he was informed by "litigations at Corcoran State Prison" that "they said they have not received anything yet."

Shortly thereafter, appellant, asked by the court for his "position as to the trial," stated: he did not have "adequate access"; he had not be able to "research the cases"; he "[had] not had had access to a Penal Code, Evidence Code or anything of that sort"; he had "nothing to write any motions with"; and he did not have "any adequate information to prepare any documents."

The court asked appellant what he was "looking for," and the following exchange ensued:

> "[APPELLANT]: ... I want to be able to file some type of motion … to dismiss, I need information based on that to be able to explain my position and why I feel like the case should be dismissed and so forth.
>
> "THE COURT: What legal ground do you believe that the case should be dismissed?

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[3] Judge Thomas DeSantos presided at the September 16 hearing. Judge James LaPorte presided at the August 26 hearing and issued the September 3 order.

"[APPELLANT]: Well, that's what I'm saying, I don't really have legal grounds. I have grounds that I feel why it should be dismissed, but I don't have any case laws that I can cite or anything or Penal Code.

"THE COURT: What grounds do you feel it should be dismissed on[,] starting with the preliminary hearing.

"[APPELLANT]: Well, I feel that it should be dismissed based on lack of evidence.

"[¶] ... [¶]

"THE COURT: ... Why do you believe that?

"[APPELLANT]: I'm looking at it from a different point of view, so like I said, I need time to prepare to be able to explain to the Court, because I know I didn't do it so that's my position. That's what I'm looking at."

Appellant further stated that he wanted to make a motion to dismiss based on "problems with the prison," which "hinder[] [him] from being able … to defend [him]self."

Shortly thereafter, the court denied appellant's motion and confirmed the matter for trial. Appellant interjected that since April 2, he had access to the computer in the prison law library two or three times, "30 minutes to two and a half hours at the most."

On the morning of September 17, prior to trial, a "Staff Service Analyst" at Corcoran State Prison faxed to the court copies of 18 pages from "Log Books"; a "LEGAL MATERIAL REQUEST FORM" apparently completed by appellant and a cover letter indicating that appellant had "requests filled by the law library" as follows: on August 8, "Lined Paper"; on August 13, copies of two cases; on August 25, a copy of another case; on August 29, "Computer access granted"; and on September 2, "Lined paper provided."

At the outset of the trial on September 17, appellant asserted as follows: He was not ready to proceed because he had not had "any time" to prepare for trial; he had not filed a written motion for a continuance because he "wasn't allowed adequate access to

the material that [he] needed in the prison"; there had been no "change of circumstance" since the previous day when the court denied his motion for a continuance; since April 2, when he began representing himself, he had not had "access to anything to prepare"; he had access to a computer on three occasions; on one occasion he was able to use the computer for approximately three hours and on the other two he had no more than an hour each time; he "couldn't print anything"; and he "never received anything" in response to the request for copies that he submitted to the law library. The court[4] stated "if this is a ... second motion for continuance, it's denied" on the basis of failure to give written notice of motion and the lack of any "new information that was not provided" to the court the previous day.

At the conclusion of trial the next day, the court, after dismissing the jury for lunch, asked appellant if he was requesting any particular jury instructions. Appellant responded he "did not have a chance to see any of the jury instructions" requested by the prosecution, so he did not know if there were other instructions he would like to request. The court ordered the prosecutor to provide appellant with a copy of the prosecution's proposed instructions by 1:00 p.m., and that court would reconvene at 1:20 to discuss the instructions and "see if [appellant] want[s] any changes or modifications to [them]." When court reconvened after the lunch break, appellant, in response to a question from the court, stated he had no objections to, or requests for modifications of, the instructions proposed by the prosecutor.

DISCUSSION

As indicated above, appellant argues he was denied "access to the resources needed to prepare and present his defense," in violation of his right to self-representation

[4] Judge Peter Schultz presided at appellant's trial.

under the Sixth Amendment to the United States Constitution, and therefore reversal is required. We disagree.

The right to counsel guaranteed by the Sixth Amendment "'includes, and indeed presumes, the right to effective counsel [citations], and thus also includes the right to reasonably necessary defense services. [Citations.]'" (*People v. Blair* (2005) 36 Cal.4th 686, 732.) The right to ancillary services also applies where, as here, a criminal defendant is self-represented. Our Supreme Court has stated that under the Sixth Amendment, "we have recognized that depriving a self-represented defendant of 'all means of presenting a defense' violates the right of self-representation. [Citation.] Thus, 'a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense.' [Citation.] Yet, as we have observed, '[i]nstitutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her defense. [Citations.] ... In the final analysis, the Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under all the circumstances." (*Id*. at p. 733.) Thus, for appellant, "the crucial question ... is whether he had reasonable access to the ancillary services that were reasonably necessary for his defense." (*Id*. at p. 734.) Moreover, a defendant must establish not only error, but the resulting prejudice. (*Id*. at p. 736; *People v. Davis* (1987) 189 Cal.App.3d 1177, 1195, disapproved on another point in *People v. Snow* (1987) 44 Cal.3d 216, 225-226.)

We assume without deciding that appellant has demonstrated the factual basis of his claim, i.e., that his access to legal research materials was limited to no more than a few hours of computer time; he was unable to consult either the Evidence Code or the Penal Code; and he did not receive copies of reported cases he requested. We further

assume without deciding that appellant has established that as a result he was denied "reasonable access to the ancillary services that were reasonably necessary for his defense." (*People v. Blair*, *supra*, 36 Cal.4th at p. 734.) Appellant's claim nonetheless fails because he has not demonstrated prejudice.

Appellant first argues that his limited access to the prison law library was prejudicial because he "never obtained jury instructions prior to trial" and, upon being provided with the prosecution's proposed instructions "after the close of all evidence," had "a mere 20 minutes to read 34 jury instructions and to register any objections or modifications with the court." There is no merit to this contention. Appellant does not suggest there was any error in the instructions given or that he would have proposed others that were not given. (Cf. *People v. Smith* (1985) 38 Cal.3d 945, 953 [rejecting similar claim where "[s]ignificantly, defendant is unable to point to any error in the instructions as given, nor does he assert that, had he studied CALJIC, he would have proposed proper instructions that were not given"].)

Appellant also argues that, because of his limited access to legal materials, he was unable to adequately research the elements of the charged offense, and that "[t]his severely prejudiced [him] in that he approached his questioning and testimony by denying that any physical touching occurred, rather than attacking one element of the battery, namely the willfulness of the touching," the element, he asserts, that was the "weakest element in the prosecution's case ...." (See *People v. Colantuono* (1994) 7 Cal.4th 206, 214 [a battery is "'any willful and unlawful use of force or violence upon the person of another'"].) However, as appellant implicitly admits, his defense was not that he *accidentally* struck Officer Healy. Rather, he was adamant in his testimony that he did not even attempt to strike his victim, and that he did not land a blow at all. Given appellant's account of events, we fail to see how additional legal research on the topic of the willfulness element of battery could have affected the outcome of the trial.

Finally, appellant claims prejudice on the basis that he was unable to research the preparation and filing of a petition of writ of habeas corpus by which he could have challenged his "lack of access." Again, we disagree. As demonstrated above, regardless of whether the limitations on appellant's access to the law library impinged on his right to self-representation, appellant has pointed to nothing in the record that even remotely suggests that further legal research would have led to a different result.

We are not aware of, and the parties do not cite, any case that discusses the standard of prejudice we are to employ. "In general, errors of federal constitutional dimension are tested by the harmless error standard defined in *Chapman v. California* (1967) 386 U.S. 18, that is, an error is prejudicial unless the reviewing court determines beyond a reasonable doubt that it had no effect on the verdict." (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1066.) However, a claim of ineffective assistance of counsel, which, like the claim appellant raises here, goes to the quality of a defendant's legal representation and is rooted in the Sixth Amendment, requires that a defendant show that a more favorable result would have been reasonably probable in the absence of the asserted error. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) Under either standard, any error in this case was harmless.[5]

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[5] In his reply brief, appellant argues that prejudice is demonstrated by several factors not asserted in his opening brief, including the following: he had "no ability to inform his legal understanding of self-defense"; he was "given no experts, legal runners, or investigators to research the law or facts surrounding the case"; he "mounted no defense to the case being prosecuted as a three strikes case, and accordingly did not seek to have any previous strikes struck"; and he was denied the assistance of advisory counsel. Because these claims are raised for the first time in appellant's reply brief, and are stated in conclusory fashion without reasoned analysis, we need not address them. (*People v. Lewis* (2008) 43 Cal.4th 415, 536 fn. 30, *People v. Windham* (2006) 145 Cal.App.4th 881, 893, fn. 8.) They are, in any event, without merit.

DISPOSITION

The judgment is affirmed.